

TWENTY-THIRD JUDICIAL CIRCUIT
OF VIRGINIA

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CIRCUIT COURT FOR THE COUNTY OF ROANOKE
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CIRCUIT COURT FOR THE CITY OF SALEM

COMMONWEALTH OF VIRGINIA

April 14, 2025

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Re: City of Roanoke, Virginia and Matthew T. Ward, In His Official Capacity as Sheriff of Botetourt County v. Jeffrey S. Schwaner and Mary Winifred Hood Schwaner, Roanoke City Circuit Court, CL25-489

Dear Counsel:

This matter is before the court upon Plaintiffs' Motion for Declaratory Judgement, filed on March 10, 2025; upon Defendants' Answer, Motion to Dismiss, and Counterclaim received on March 17, 2025, and filed by this court on April 1, 2025, without objection; and upon Plaintiffs' Answer to the Counterclaim, filed on March 24, 2025. An evidentiary hearing was conducted on April 1, 2025. Major Andrew Reece, Crime Analyst for the Roanoke City Police Department ("RPD"), testified for Plaintiffs. Defendants, by counsel, presented a packet of information regarding FOIA requests made to the Plaintiffs as well as other jurisdictions throughout the Commonwealth of Virginia. The court has considered the pleadings, the evidence submitted, the oral arguments made at the hearing on April 1, 2025, and is ready to rule.

I. Declaratory Judgment, Va Code §8.01-184.

This case was brought pursuant to the Declaratory Judgment Act. Va. Code §8.01-184 provides:

In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time, could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of rights is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of rights.

Va. Code § 8.01-184 (1950, as amended).

This court finds that it is constrained by the "within the scope of their respective jurisdictions" language of § 8.01-184. The Twenty-Third Judicial Circuit does not encompass Botetourt County. *See also*, Va. Code §2.2-3713(1). Accordingly, this court declines to address the issues brought by the Sheriff of Botetourt County, and he is dismissed as a Plaintiff in this action. This opinion will address the Motion for Declaratory Judgment brought by the City of Roanoke.

II. Background.

There are virtually no factual matters in dispute in this case. For purposes of this proceeding, Defendants have stipulated to the authenticity of contracts and other governing documents. Likewise, Plaintiffs had no dispute with Defendants' Exhibit 1, which contained Plaintiff Jeffrey Schwaner's journal of his contacts with various localities, emails, articles, and the like.

City of Roanoke is a party to a Government Agency Agreement ("Agreement" or "Contract") with Flock Group, Inc. ("Flock"). Motion for Declaratory Judgment ("Motion"), Ex. C. Pursuant to the Agreement, Flock provides hardware and software in a program commonly referred to as a license plate reader ("LPR"). The LPR data or "Flock data" acquired through the Flock system belongs to Roanoke City. Motion, para. 5. The Agreement's term was for 24 months from the date signed by all parties, subject to an automatic renewal unless either party gave notice. (Motion, Ex. C, page 1, and sec. 6.1.) The Agreement was in effect at all times relevant to the facts alleged in the Motion.

The Agreement provides in Section 2.5.1 that the permitted usage of the collected data is only for lawful criminal investigations by the appropriate governmental agency. Motion, Ex. C, para. 2.5.1.

Roanoke Police Department policy establishes strict guidelines for the use of Flock data and associated equipment. The policy explicitly limits the use of this data for official law enforcement purposes, and strictly prohibits use of the Flock data for personal or unauthorized purposes. The Motion refers to Operational Directive 62.1.12 (Motion, para. 10). See also Motion, Ex. F, p. 2, Sec. IV (B).

The Flock system is able to capture not only a license plate image, but also corresponding locations, dates, and times. The Flock system, by virtue of its cameras, can collect and store specific information regarding a vehicle, including color, roof racks, bumper stickers, vehicle damage, and the like. The information is only kept in the Flock database for 30 days. After 30 days, the information is purged by Flock. Agreement, sec. 2.1. If it is accessed by the City, it can be stored.

On February 13, 2025, Defendant Jeffrey Schwaner drove through the Commonwealth of Virginia, noting the jurisdictions through which he had traveled. Def. Ex. 1. Several days later, Mr. Schwaner submitted Freedom of Information Act ("FOIA") requests to the various jurisdictions through which he had traveled, including Roanoke City. On February 21, 2025 he made a FOIA request to Roanoke City seeking "all the information gathered about my personal vehicle (see plate number below) in the past 30 days from your public-facing Flock cameras – including but not limited to images with corresponding locations, dates and times – as well as from all cameras to which you have been granted excess by participating agencies using the

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Flock system. I am also requesting the 'vehicle fingerprint' for my personal vehicle which Flock's contract (sec. 1.30) describes as a unique feature of its technology." *Id.* 29.

By email dated February 28, 2025, Roanoke City responded "Please be advised that is practically impossible to provide the requested records, or determine whether they are available, within the 5 working days required by FOIA due to staffing and the time needed to compile and review responsive records. Therefore, the City invokes § 2.2-3704(B)(4) providing an additional seven working days to respond to your request. The deadline for the City to respond to your request is March 11, 2025." *Id.* at 33–34. By email dated February 28, 2025, Mr. Schwaner acknowledged receipt of the email. *Id.* at 34.

By email dated March 7, 2025, Roanoke City requested a copy of the registration for Mr. Schwaner's vehicle associated with the tag in question. *Id.* at 34–35. By email dated March 7, 2025, that information was provided. *Id.* at 35.

By email dated March 7, 2025, Roanoke City requested that defendant Mary Schwaner give her authorization for the search, since the vehicle was registered in both Defendants' names. *Id.* at 35–36. By email dated March 7, 2025, Mr. Schwaner looped Mrs. Schwaner in on the email request, and Mrs. Schwaner responded promptly, authorizing the search. *Id.* at 36–37. By email dated March 7, 2025, Roanoke City acknowledged receipt of her consent. *Id.* at 37.

By email dated March 7, 2025, at 2:50 p.m., Roanoke City requested additional time to respond to the FOIA request. Specifically, the City stated:

Would you be agreeable for additional time for the City to respond to your request?

The situation the City finds itself in with regard to responding to your request is that the search for Flock data, in this circumstance, is against RPD policy and the City's Agreement with Flock.

Further, there is concern of potentially violating Va. Code §18.2-152.5:1, a Class 6 felony. In order to ensure that directing RPD personnel to perform a Flock search, against RPD policy and the Flock Agreement, is not a violation of Va. Code §18.2-152.5:1, the City is filing a Declaratory Judgment with the Circuit Court and requesting the Court provide guidance in this matter.

If you are agreeable to additional time, we will include that in our Petition. If you are not, we will need to Petition the Court for the additional response time.

Thank you for your patience.

Id. at 38.

By email dated March 10, 2025, at 5:04 p.m., Defendants were provided with a copy of the Motion for Declaratory Judgment filed in Roanoke City Circuit Court. *Id.* at 38-39.

By email dated March 10, 2025, at 5:13 p.m., Mr. Schwaner stated “Received. I think this will be very helpful in clarifying the questions around the collection of this public-facing surveillance data.” *Id.* at 39.

III. Pleadings and Argument.

A. Plaintiff’s Position.

The Plaintiff’s Motion’s requested relief (page 10) sought a declaratory judgement under Va. Code § 8.01-184 to have the court declare the rights and obligations of the parties with respect to the FOIA request for Flock data in light of the internal policies of the City, and the applicability of Va. Code § 18.2-152.5:1. It asked the court to address the request for information about Defendants’ personal vehicle gathered by cameras operating outside of the agencies, who have granted access to their records, as well as address potential contract liability claims for breach of the Agreement entered into between the City and Flock. It directed the court’s attention to House Bill 2724. *Id.* at para. 15. It noted concerns over safety and privacy concerns, which give justification for withholding the data. *Id.* at para. 17. In the alternative, the City requested additional time to respond to the FOIA request, should the court rule that said production of data should be required. *Id.* at 10. During oral argument, it also raised copyright issues.

B. Defendants’ Position.

In their Answer, Defendants argued that Roanoke City may not use third party contracts to subvert the requirements of FOIA. Answer, paras. 5–6. They argued that RPD policy cannot govern whether a FOIA request can be answered. *Id.* at para. 10. They argued that House Bill 2724, which has not been enacted, would not be effective until July 1, 2025, if at all, and thus could not be relied upon to refuse the FOIA request. *Id.* at para. 15. The Answer also denied the applicability of the Declaratory Judgment Act, Va. Code §8.01-184. *Id.* at paras. 19, 20, and 22.

Defendants asserted that any request for an extension of time under FOIA was moot because the data has been purged, and that any such extension would have been self-executing and did not require a response from the requestor. *Id.* at para. 25. They further alleged that the request for additional time to respond was not available and was not applicable to Va. Code §2.2-3704(C). *Id.* at para. 26.

Defendants argued that there is no “controversary” available under these facts and that the actions should be dismissed because Plaintiff has an adequate remedy at law. Motion to Dismiss, para. 28.

In their Counterclaim, Defendants alleged a violation of FOIA and sought to enforce FOIA as provided in Va. Code §2.2-3713. Since the City had failed to respond by either agreeing or refusing to provide the requested information, it is presumed to have violated FOIA. Countercl., para. 53. Defendants pointed out that the public body has the burden of proof to establish an exclusion to FOIA by preponderance of the evidence. *Id.* at para. 51 (citing Va. Code §2.2-3713(E)).

C. Plaintiff’s Response to Counterclaim.

In addition to general denials, Plaintiff pointed out that Defendants’ request would require them to create a new record, invade the privacy and jeopardize the safety of themselves or others, and subject all the parties to potential criminal liability. Answer to Countercl., para. 18. At the hearing on April 1, Plaintiff also raised a concern over violating Flock’s rights under federal copyright law by complying with the FOIA request.

Plaintiff noted that, with regard to paragraph 73 (referring to the data being produced by algorithmic processing), the records Defendants seek cannot be created without a human being accessing two data bases and/or combining multiple reports to create a third, a record that the Supreme Court of Virginia has held is of a different character from the original records, and thus not subject to production. *Id.* at para. 26. They denied that they had violated FOIA and that the Defendants are entitled to any relief sought.

IV. Analysis.

A. Preliminary Matters.

First, the court holds that Declaratory Judgment is appropriate in this case. Defendants argue that declaratory relief is inappropriate for determining how Virginia’s FOIA statutes apply to certain documents. However, the declaratory judgment statute seems to contemplate exactly such a use. *See* Va. Code § 8.01-184 (permitting courts to interpret statutes). The court also notes that other courts have used declaratory judgments in the context of FOIA requests. *E.g., Tull v. Brown*, 255 Va. 177 (1998); *Town of Saltville v. Surber*, 83 Va. Cir. 161, 162 (2011).

The court notes that there is a question of mootness. Major Reece testified that a search was never performed for the data that Mr. Schwaner requested. He also testified that the data was purged 30 days after its creation. Accordingly, it would be impossible to comply with the request—potentially making this issue moot. However, the court finds that this situation falls within the “capable of repetition, yet evading review” exception. *See Commonwealth v. Browne*, 303 Va. 90, 95 (2024). The brief period of time for which the data is retained makes litigating,

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briefing, and hearing these issues is difficult, if not impossible, in a timely manner. There is also a “reasonable expectation” that the City will be “subject to the same action again” if the matter is not ruled upon. *Id.*

To that same end, however, the court finds that Mr. Schwaner’s request for the now nonexistent data has been denied. According to Major Reece, the data was never retrieved due to the internal policies at issue in this case. Because the requested data was not produced, and it was deleted after 30 days, its production is impossible. The request for the data then has been denied by the City.

B. Questions Before the Court.

The Motion and facts before the court present a very narrow issue. The issue is whether LPR or Flock data covered by the Agreement that is requested under FOIA on a single occasion by the joint owners of a motor vehicle is a public record available to the people who own the vehicle, and, if so, whether an exception to the FOIA request can be claimed.

C. Is the LPR data covered under FOIA?

Yes, the data owned by Roanoke City is covered by Virginia Code § 2.2-3704(G). Although the Flock data is obtained in pursuit of preventing and addressing crime, the data requested by Defendants was not a part of an active criminal investigation. *See* Va. Code § 2.2-3706(B). The City acknowledged that the data on its face appears covered by the Act. Motion, para. 7.

The court notes that the City is also the presumed custodian of the data, despite the fact that the data is maintained by Flock. The Agreement indicates that the raw data taken and captured by the cameras belongs to the City. Motion, Ex. C. FOIA provides that the City continues to be the custodian of the data for “purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester.” Virginia Code § 2.2-3704(J).

The City argues that defendants are requesting a “new public record” for purposes of FOIA. The City is required to disclose covered records that already exist but is not required to create new records in response to FOIA requests. Va. Code § 2.2-3704(D). However, “the conversion of data from one available format to another shall not be deemed the creation, preparation, or compilation of a new public record.” Va. Code § 2.2-3704(G). Additionally—for electronic databases—a responding municipality is required to produce that data in a format used in the regular course of business. Va. Code § 2.2-3704(G). The court holds that simply running the report to compile the raw data already existing is not a new record for purposes of FOIA.

D. Can an exception be claimed?

The primary question posed by the City's Motion is whether the City can claim an exception or otherwise withhold the data based on one of various concerns: (1) internal Roanoke Police Department policies governing the gathering of Flock Data; (2) Virginia Code § 18.2-152.5:1; (3) the contract between Roanoke City and Flock; (4) producing records gathered by other jurisdictions; and (5) exclusions to production for safety and privacy concerns (under §2.2-3706(D)). The court may examine other statutory exclusions to producing public records under Va. Code §2.2-3705.1, §2.2-3705.2 and §2.2-3706.

i. Internal Policies.

The Virginia Freedom of Information Act provides that, “[a]ny ordinance adopted by a local governing body that conflicts with the provisions of this chapter shall be void.” Va. Code § 2.2-3700. Local policies, however prudent, must bend to the requirements of the Act. If an exception is not provided by the act, no such exception exists. If a local ordinance or policy secretes information that would otherwise be released, the policy is void.

RPD policy prevents the use of Flock data for any purpose besides “official law enforcement purposes.” Motion, Ex. F. To the extent that the policy prevents RPD from releasing documents that would otherwise be obtained in a FOIA request, the policy is void.

ii. Virginia Code § 18.2-152.5:1.

Virginia Code § 18.2-152.5:1(A) prohibits anyone who is not a law-enforcement officer, acting in the performance of his official duties, from using a computer to obtain “identifying information”¹ “through the use of material artifice, trickery or deception.” Section B and C are only applicable to data obtained this way. In the case of a lawful FOIA request, officers or other individuals retrieving this data would be doing so as part of their official duties—no “material artifice, trickery, or deception” would be required.

It could also be noted that it is not unlawful to access “identifying information” with the permission of the “person or persons who are the subjects of the identifying information” for the purposes of other crimes. Va. Code § 18.2-186.3(A). Here, Mr. Schwaner and his wife were requesting only their own information, rather than the information of another.

¹ For an interesting discussion regarding LPC data as “identifying information” in a different context, see *Neal v. Fairfax City. Police Department*, 295 Va. 334, 345 (2018).

Under these facts, Roanoke City cannot claim an exception to FOIA under Virginia Code § 18.2-152.5:1(A).

iii. Contract with Flock.

The contract with Flock specifically contemplates compliance with FOIA and compliance with FOIA cannot violate the contract as written. Flock's boilerplate contract does not explicitly address agency data with regard to FOIA. However, attached to the Agreement at Exhibit C is "EXHIBIT A, CITY OF ROANOKE, VIRGINIA, ADDENDUM TO CONTRACTOR'S FORM CONTRACT" with the Contractor identified as "FLOCK GROUP, INC." ("Addendum"). The Addendum specifically states that certain provisions or limitations "shall not have any force and effect against the City." Motion, Ex. C, Addendum, p. 1, para. 1. Among those named are any provisions:

o. Requiring the City to withhold information from the public contrary to the requirements of the Virginia Freedom of Information Act, § 2.2-3700 et. seq.,

Id., p. 2, para. 1 (o).

The Addendum was signed by both Flock and City representatives on March 29, 30 and 31, 2023. Addendum. Thus, the Agreement between the City and Flock specifically contemplates that the City must be allowed to comply with the Virginia Freedom of Information Act. The court finds therefore, that the City's concern over violating the contract or federal copyright laws in order to comply with FOIA is unfounded.

iv. Public Records of Other Jurisdictions.

City of Roanoke seeks to determine whether it must produce the Defendants' LPR public data compiled by Flock for other public agencies but which may be accessible by the City under its Agreement.

The definition of "public records" means certain described writings and recordings "prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business." Va. Code §2.2-3701.

The court lacks information necessary to respond to this request. If the records of another agency are in the database accessible by Roanoke City, it could be said that those records are "in the possession of" Roanoke City. However, the court could not determine this information from the record.

v. Exclusions from FOIA and Discretionary Releases.

Va. Code §2.2-3706 lists a number of public records that are excluded from mandatory disclosure, but which may be disclosed in the discretion of the custodian, except where otherwise prohibited by law. City of Roanoke points to §2.2-3706(D). This section allows withholding of noncriminal records maintained by law-enforcement agencies, where release of information that contains identifying information of a personal nature would jeopardize the safety or privacy of any person. The concern would be appropriate with regard to “unrestricted Flock data,” as described by the City. Motion, para. 17. However, the issue before the court only pertains to Mr. and Ms. Schwaner’s own personal data, to which both owners have consented, not “unrestricted Flock data.” Mr. Schwaner did not request data for a vehicle he did not own, and when the City requested that Ms. Schwaner give her consent, as a co-owner, that information was provided immediately. As the facts before the court stand, giving the data requested to the persons requesting it cannot jeopardize the requestors’ safety or privacy.

City of Roanoke has not pointed to any other exemption not discussed herein, and the court does not see any exemption or nonmandatory disclosure cited in §2.2-3705.1 or §2.2-3705.2 that would apply.

E. Counterclaim, Mandamus, Costs and Attorney’s Fees, and Penalties.

As noted above in Section IV(A), Mr. Schwaner’s request for Flock data was denied for all practical purposes, because the records he requested were purged by the system. The City’s Motion requested additional time to respond under Virginia Code § 2.2-3704(C). This provision allows a court to grant additional time to respond when a FOIA request seeks an “extraordinary volume of records or requires an extraordinarily lengthy search.” The court finds that the data sought would not have come within this extension. Testimony at the evidentiary hearing indicated the time necessary to respond to Mr. Schwaner’s request would be relatively quick. However, the court finds that the question is moot because the data has been destroyed. Thus, the option of mandamus is not available. To the extent that Defendants want a LPR Flock search at this time, upon request, the City will provide it.

Because the request was denied, and none of the concerns raised by the City are sufficient to exempt a request from FOIA, the court finds that the City violated the statute by failing to provide Mr. Schwaner’s own LPR Flock data to him after obtaining the consent of the vehicle’s co-owner. The court finds that Mr. Schwaner has substantially prevailed on the merits and grants his reasonable attorney’s fees and costs associated with this action.

The court does not, however, find that Mr. Schwaner’s request was “willfully and knowingly” denied, as required by Va. Code §2.2-3714 in order to impose penalties. The City had questions about its status as a custodian of records not searched, its contract with Flock,

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RPD's policies, and the potential for criminal liability. Those reasons were ultimately not accepted by the court, but they appear to have been made in good faith and the court cannot say their denial was willful or knowing. Mr. Schwaner did not agree for the data to be withheld, but he acknowledged that there were "questions," and that the Motion would be "helpful." Def. Ex. 1, p. 39. The court therefore will not impose a fine or penalty on the City for its wrongful denial of Mr. Schwaner's request.

The court assumes that the City accepts Mr. Koehler's attorney's fee exhibit as reasonable. If not, a hearing may be scheduled. Otherwise, Mr. Koehler is requested to prepare an order for endorsement by counsel for City of Roanoke and counsel for Sheriff Ward.

I would like to extend my appreciation to counsel for the courteous and efficient presentation of this most interesting issue.

Best wishes.

Very truly yours,

A handwritten signature in cursive script, appearing to read "L. Ciaffone".

Leisa K. Ciaffone

LKC:ph